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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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| In re Marriage of MARY and MICHAEL C. THEURER. | B196973 |
| MARY C. THEURER,<br>Appellant,<br>v.<br>MICHAEL C. THEURER,<br>Appellant. | (Los Angeles County Super. Ct. No. BD278354) |

APPEALS from a judgment of the Superior Court of Los Angeles County, John W. Ouderkirk, Judge and Keith M. Clemens, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed as modified.

Mazur & Mazur, Janice R. Mazur and William E. Mazur, Jr., for Appellant Mary C. Theurer.

Law Office of Bruce Adelstein and Bruce Adelstein; Levin, Margolin & Itzkowitz and Lionel P. Levin for Appellant Michael C. Theurer.

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Mary C. Theurer and Michael C. Theurer cross-appeal from the judgment entered in their marital dissolution action after bifurcated trials. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

1. *The Theurers' Marriage and Community Orthodontic Practice*

Mary and Michael[1] were married on September 16, 1977 after meeting the prior year while both of them attended Utah State University. Michael began dental school five years later. In 1988, after Michael completed post-graduate work in orthodontics, Michael, Mary and their two children moved to Lancaster where Michael opened an orthodontic practice.

Mary helped Michael find, design and build the office facilities. Although Mary was never employed by the practice, from the outset she assisted by handling billing, answering telephones and completing other tasks around the office. Other than for a period after their third child was born, Mary continued to help at the office until just before Michael and Mary separated.

By the time the practice was valued in 2003 it had grown into a sophisticated and highly profitable one. Although Michael was the only licensed orthodontist in the office, the practice had 14 other employees, including a laboratory technician, a sterilization technician and eight orthodontic dental assistants. Michael saw from 100 to 150 patients on days when he regularly treated patients and approximately 225 patients per day on one or two days each month. While he assessed each patient's treatment at every visit, much of the patients' interaction was with the staff, allowing Michael to treat more patients in a month than other orthodontists.[2] Michael also used the most advanced computer technology and orthodontic materials. In 2002 the practice generated approximately $2.5 million in gross revenue, and Michael earned about $1.2 million in pre-tax income.

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1 As is customary in family law matters, we refer to the parties by their first names for convenience and clarity. (*In re Marriage of Herr* (2009) 174 Cal.App.4th 1463, 1466, fn. 1.)

2 Michael also had a small satellite practice in Tehachapi, where he took some staff once or twice each week to treat patients in that area.

An orthodontic practice requires new patients, referred to as "new starts," each year to remain profitable. While the typical sole practitioner orthodontist has approximately 250 new starts per year, Michael's new starts were 973 in 1999, 951 in 2000, 896 in 2001 and 866 in 2002. To maintain such an extraordinary level of new patients, Michael spent a substantial amount of time marketing and promoting the practice, including sponsoring youth sports teams, beauty pageants and academic events and engaging in activities with local dentists to increase referrals.

Mary and Michael separated on February 25, 1998, after more than 20 years of marriage. Mary filed a petition for dissolution of marriage on April 21, 1998. Between May 1998 and November 2001 Mary received $34,357 per month in combined spousal and child support.[3] Beginning November 2001 Mary received $26,850 per month in spousal support and $7,500 per month in child support.

2. *Valuation of the Orthodontic Practice*

At a bifurcated trial held between August and October 2003, the trial court valued the orthodontic practice. Although agreeing the practice was a community asset, Mary and Michael disagreed on several significant aspects of the valuation.

a. *Mary's expert's valuation of $3,014,000*

Edward Lieberman, a certified public accountant specializing in forensic accounting in family law matters, testified he used an "investment value" standard to value the orthodontic practice at $3,014,000. Lieberman explained investment value measures the value of the business to the owner "assuming the status quo based upon past historical revenues and expenses, assuming that it will continue in the future in the same light."

Central to Lieberman's analysis was determining the value of the practice's goodwill—that is, the intangible value of the expectation of continued public patronage. Lieberman valued the goodwill at $2,521,000 using an "excess earnings" approach.

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3 Mary and Michael have three children. At the time of separation the older two children were adults, and the youngest was eight years old.

Lieberman explained he calculated the excess revenue available to Mary and Michael as owners of the business above a reasonable rate of return on the practice's assets and reasonable compensation for Michael. He then multiplied that figure by a capitalization rate that reflects "the degree of risk that the appraiser believes is inherent in the excess earnings continuing in the future." In preparing his valuation Lieberman relied on the opinion of Mary's compensation expert, Martin Wertleib, who had determined the reasonable annual compensation for Michael's services to the orthodontic practice was $500,000. Lieberman selected a capitalization rate of four, representing a relatively low degree of risk, based in part on the practice's five-year increase in gross revenue and Michael's consistent net income, which he believed reflected stable earnings.

b. *Michael's experts' valuations of $1.6 million and $126,095*

Michael presented two experts to opine on the practice's value: Thomas Fitterer, who originally had been retained by Mary to value the practice, and Mark Kohn, a forensic accountant specializing in family law matters.

i. *Fitterer's fair market valuation of $1.6 million*

Fitterer, who had almost 40 years of experience in brokering professional practice sales, testified the fair market value of the practice—that is, what a buyer would be willing to pay for the practice assuming Michael was no longer providing services but the practice's past earnings would continue into the future—was $1.6 million. According to Fitterer, the excess earnings approach employed by Mary's expert to value goodwill is not normally used in connection with the sale of a professional practice. Instead, Fitterer used two different methods to determine fair market value. In the first Fitterer estimated the value of the tangible assets, including equipment, supplies and accounts receivable, was $300,000 and then added $1.3 million for goodwill, calculated by multiplying Michael's estimated net income of $1 million ($200,000 less than the amount the court had found) by 1.3 (130 percent). Fitterer testified, based on his experience, the goodwill component of a professional practice sells for between 50 percent and 300 percent of net income. Although an arbitrary figure, he believed 130 percent of net income was appropriate to use in this case.

In the second method Fitterer multiplied the gross revenue of the business, which he estimated at $2,640,000, by 60 percent. Fitterer testified buyers, sellers and banks use a multiple of gross revenue to value an orthodontic practice. Fitterer chose a 60 percent multiple in large part because of the practice's location in Lancaster. Fitterer testified 85 percent of prospective buyers want a practice within 15 miles of the ocean. Notwithstanding Fitterer's characterization of "the facility [as] one of the best this Appraiser has seen," Fitterer believed the value would be 80 percent to 90 percent of gross revenue, or $2 million, if the practice were located in Santa Monica.

Fitterer testified the number of new starts for an orthodontic practice is relevant to determining fair market value, but explained he had not received that information for Michael's practice even though he had asked for it. Fitterer was surprised to learn Michael had 866 new starts in 2002, which he conceded would have a positive effect on the value. He also testified he had never appraised a practice with such a large number of new starts. (The most starts of any orthodontic practice he had sold in the previous five years was 400.) In response to Michael's counsel's repeated attempts to establish a buyer would pay less for a practice with 866 new starts, instead of the average of 250, because the buyer would have to hire more people to do the work, Fitterer responded, "I would think [it] would be wonderful to have 866 starts. Great Scott, that's a lot. You sure it's 866 new starts? . . . That's a lot. . . . It's positive. . . . The [buyer] would clap his hands. . . . I would think it would be positive. The more the merrier."

ii. *Kohn's investment valuation of $126,095*

Kohn, like Lieberman, used an investment value standard. He concluded the practice's value was only $126,095. In reaching this significantly lower valuation, Kohn calculated goodwill by using three methods—three-month gross income, the market method and, like Lieberman, capitalization of excess earnings—and took a weighted average of the three to arrive at a goodwill figure of $980,000, compared to Lieberman's figure of $2,521,000. With respect to the capitalization of excess earnings method, Kohn testified he used a multiplier of 2.5 because he believed the orthodontic practice was risky. He explained the practice was dependent on Michael's effort, a competing orthodontist could easily enter the market because it was not capital intensive, and Michael's new starts and income had been decreasing in recent years.[4]

The second reason for the significant difference in the two valuations was the treatment of patient prepayments. Michael typically collected at least 25 percent of the total cost of treatment as an initial payment. He then billed and received the remaining 75 percent of treatment cost over the next 18 months. Because orthodontic treatments usually last for 24 months, the patients effectively prepaid for a portion of their services. Kohn testified he believed patient prepayments, which he calculated as $1,175,978, were a liability that should be deducted from the value of the business because, among other reasons, if Michael stopped working he would have to hire another orthodontist to provide the services or refund the patients' money. Lieberman, however, testified he did not treat patient prepayments as a liability because the patients' contracts with Michael did not provide for refunds and in 2002 Michael had refunded to patients only about $30,000, which had been factored into Lieberman's goodwill calculation.

c. *The court's finding the value of the practice was $2.4 million*

The trial court issued a statement of decision on February 3, 2004 and an order on February 4, 2004 finding, based on Michael's testimony and for purposes of the valuation, Michael was "one of the best orthodontists in the world" with "no competitors whatsoever, and the level and quality of the orthodontic services that he provides is of a higher standard than that of any other orthodontic practice in the Antelope Valley." The court found the value of the practice was $2.4 million based on Lieberman's "methodology and analysis," which it described as "appropriate and credible"; but the court determined a capitalization rate of three, not four, was appropriate to reflect its finding the practice was "substantially dependent on [Michael's] exceptional orthodontic and managerial skills."

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4 Not only was Kohn's capitalization rate lower than Lieberman's, his excess earnings figure was lower because he concluded Michael's reasonable compensation was $776,000, not $500,000.

The court rejected Michael's argument, raised and briefed during the trial, it was required by law to use "fair market value," rather than "investment value," unless there was no established market for the sale of the practice. Although the court found Fitterer was a credible, experienced and unbiased witness, the court rejected his fair market valuation of $1.6 million in part because Fitterer, who "was visibly shaken when he learned that the community orthodontic practice had over 850 new patients during the year 2002, . . . failed to adjust his opinion regarding the value of the practice after he learned about the extraordinarily high number of new starts at the practice" and "Fitterer inappropriately reduced the value of the community orthodontic practice because he did not believe that the Antelope Valley was a desirable location for an orthodontic practice."

The court also rejected Michael's argument the value of the practice should be reduced by recognizing a liability of $1,175,978 for patient prepayments because the liability was not immediate and specific. The court found the written agreement pursuant to which payments were made to the orthodontic practice did not provide for refunds, a substantial portion of the $30,000 of refunds made in 2002 were due to payments made by insurance companies resulting in patient overpayments and there was no evidence all of Michael's patients were going to terminate their relationships. Moreover, in addition to generally finding "the valuation testimony of Mr. Kohn is not persuasive given the facts of this case," the court specifically found "Mr. Fitterer's testimony impeached Mr. Kohn's testimony by showing that it is not appropriate to reduce the value of the Community orthodontic practice to reflect a liability for prepaid orthodontic services."

3. *The Trial of Other Property Issues*

A further bifurcated trial to resolve additional issues was conducted before a private judge pursuant to the parties' stipulation on various dates between December 2004 and May 2005. Michael and Mary agree the court's written tentative decision dated August 29, 2005 was intended to be its final decision except as modified at a hearing on February 28, 2006. Those modifications are memorialized in an amended statement of decision filed on March 8, 2006. On December 20, 2006 the court entered a final judgment.

a. *The court's finding Mary was not entitled to a "Watts" credit for Michael's exclusive use of the orthodontic practice during the period of separation*

Mary argued, just as a spouse is entitled to reimbursement for the other spouse's post-separation exclusive use of the family residence or other community asset, she was entitled to a credit for Michael's exclusive use of the orthodontic practice during the period of separation—commonly referred to as a *Watts* credit or a *Watts* charge. (*In re Marriage of Watts* (1985) 171 Cal.App.3d 366 (*Watts*).) Mary's accounting expert, Stephen Reiss, testified Mary was entitled to $524,245 (50 percent of $1,048,490), a figure he calculated by adding for each month from March 1998 through May 2004 Michael's salary before taxes, perquisites and business net income; subtracting spousal support; and multiplying the resulting figure by the interest rate on five-year treasury notes for the month of earning extended through May 2004.

Kohn, Michael's forensic accountant, did not provide an alternative calculation. Instead, he criticized Reiss's methodology in several respects, including Reiss's treatment of all of Michael's salary as a benefit derived from use of the community asset, rather than deducting a portion of his salary that should have been considered reasonable compensation for his labor; Reiss's failure to reduce Michael's salary by the amount of income taxes he had paid; and Reiss's failure to consider that any *Watts* credit awarded Mary would have been considered income to her that would have reduced her spousal support.

The trial court declined to award Mary any credit for Michael's exclusive use of the business, finding "Mr. Reiss's methodology does not produce a measure for a *Watts* charge that reasonably measures the value or benefit of having exclusive possession of the community property orthodontic practice. Mr. Reiss's *Watts* charge is basically a tax on all salary that [Michael] receives from the practice as well as any earnings that are left after [Michael] takes his salary. The court thinks this is a fundamental flaw." The court identified several additional concerns about the methodology, including "[t]he spousal deduction in Mr. Reiss's methodology does not necessarily address the problem of recapturing the amount of temporary spousal support that [Michael] has been paying, an amount that would have been less had [Michael] somehow been able to pay [Mary] her share of the appropriate charge for [Michael's] exclusive use of the practice." Ultimately, the court concluded there was a "conflict in principle" in imposing a *Watts* charge on a party's use of a community property, income-producing professional practice if there has been a temporary spousal support order based on the same income.

b. *The court's finding Michael did not breach his fiduciary duty to Mary in connection with his receipt and use of a 1997 income tax refund*

After the parties separated in 1998 Michael prepared joint federal and state personal income tax returns for 1997. Mary testified Michael "showed up at my door one day" and insisted she immediately sign the returns without providing her an opportunity to review them. Mary stated, "I took the return out of his hand and I said, 'I have to look at it first before I will sign it.'" However, Mary did not sign the returns because, as she explained, Michael "had arranged to have—he had overpaid the taxes to about $250,000 . . . [a]nd wanted to sign for that overage of taxes to be applied to the following years' taxes so that we wouldn't get the refund."

Michael, on the other hand, testified he had told Mary they would be receiving a refund, but it would be larger if they filed jointly. However, the first time he attempted to provide the tax returns and documentation to Mary she would not take it. Although Mary later accepted the documents, the time for filing had expired so Michael requested an extension. After additional, unsuccessful attempts to get Mary to sign the return, Michael finally decided to file his personal tax returns individually.

Michael received a state tax refund of $46,789, which he deposited in his bank account and eventually spent. Michael had one-half of the federal tax refund of $190,155 applied to his 1998 personal income taxes and received a check for the other half, which he deposited into his bank account. Michael did not tell Mary he had received the refunds or give her any of the money.

In March 2001 Mary sought an order seeking to place the 1997 tax refund in a blocked account. In an order filed February 19, 2002 the court denied Mary's request, instead requiring Michael "'to account for the use of the funds at trial.'"

At trial Mary argued Michael's receipt and use of the tax refunds constituted a breach of his fiduciary duties to her. The court rejected Mary's argument, finding Michael "did not fail to disclose the overpayment of taxes for 1997 or otherwise fail to account" for the refund payment. The court, however, found the refunds were community property and ordered Michael to reimburse the community for them.

## CONTENTIONS

Michael contends the trial court erred in valuing the orthodontic practice because it failed to use fair market value and failed to properly account for the patient prepayment fees in determining its value. Mary contends the trial court erred in failing to award her credit for Michael's exclusive use of the orthodontic practice during the period of their separation and finding Michael had not breached his fiduciary duty to her in connection with his receipt and use of a community tax refund.[5]

## DISCUSSION

### 1. *The Trial Court Did Not Abuse Its Discretion in Valuing the Community Orthodontic Practice at $2.4 Million*

In a marital dissolution action, absent an agreement by the parties, the court must generally divide the community estate equally. (Fam. Code, § 2550;[6] *In re Marriage of Cream* (1993) 13 Cal.App.4th 81, 87.) "Valuation of items of community property in a

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5 Mary also argues the trial court erred in crediting all proceeds from the sale of the community 1996 Jeep Cherokee against Michael's equalization payment, rather than 50 percent of the proceeds. Michael concedes the court erred and does not object to correcting the judgment to reflect the proper credit.

6 Family Code section 2550 states, "Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, or as otherwise provided in this division, in a proceeding for dissolution of marriage or for legal separation of the parties, the court shall . . . divide the community estate of the parties equally."

Statutory references are to the Family Code unless otherwise indicated.

dissolution proceeding is a question of fact for the trial court." (*In re Marriage of Asbury* (1983) 144 Cal.App.3d 918, 923.) The court has "broad discretion to determine the manner in which marital property is divided in order to accomplish an equal division. [Citation.] Likewise, as long as its determination is within the range of the evidence presented, the court possesses broad discretion to determine the value of community assets." (*Cream*, at p. 88.)

Generally, the trial court's rulings dividing community property are reviewed under the abuse of discretion standard. (*In re Marriage of Dellaria* (2009) 172 Cal.App.4th 196, 201.)[7] If a finding of value of a community asset is challenged on the ground it is not supported by the record, appellate review is limited to a determination whether there is any substantial evidence, contradicted or uncontradicted, that supports the finding of fact. (*Ibid.*; see *In re Marriage of Micalizio* (1988) 199 Cal.App.3d 662, 673 ["trial court's determination of the value of a particular asset is a factual one which will be upheld on appeal if supported by substantial evidence in the record"].) However, whether the trial court applied the correct legal standard to the issue is a question of law for this court. (See *KB Home v. Superior Court* (2003) 112 Cal.App.4th 1076, 1083 ["even when a decision by the trial court is generally reviewed for abuse of discretion, we must determine at the outset whether the court applied the correct legal standard to the issue in exercising its discretion, which determination is also a question of law for this court"].) "The scope of discretion always resides in the particular law being applied; action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an abuse of discretion." (*Choice-In-Education League v. Los Angeles Unified School Dist.* (1993) 17 Cal.App.4th 415, 422.)

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7 An abuse of discretion will not be found unless "the trial court exceeded the bounds of reason, all of the circumstances before it being considered." (*In re Marriage of Connolly* (1979) 23 Cal.3d 590, 597-598; see *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479 ["The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court."].)

a. *Valuation of the goodwill of the orthodontic practice*

A professional practice established after marriage by one spouse is a community asset that must be valued by the court. (*In re Marriage of Lopez* (1974) 38 Cal.App.3d 93, 105, disapproved on another ground in *In re Marriage of Morrison* (1978) 20 Cal.3d 437, 453 ["[i]t is generally settled that the efforts, time and skills of the husband are community assets"].) Generally, in establishing the value of a professional practice the trial court must determine the existence and value of tangible assets, such as cash, furniture and equipment, other assets, including properly aged accounts receivables, and liabilities of the practitioner related to the business. (See *Lopez*, at p. 110; *In re Marriage of Iredale & Cates* (2004) 121 Cal.App.4th 321, 327.) In addition, goodwill, an intangible asset, may exist in a professional practice or business "founded upon personal skill or reputation." (*In re Marriage of Foster* (1974) 42 Cal.App.3d 577, 582, fn. 2 (*Foster*).)[8] "It is undisputed that in a dissolution case involving a professional practice the court must determine whether goodwill exists. If it does, the court must value it and take it into consideration in dividing the community property." (*Watts, supra*, 171 Cal.App.3d at p. 370.) Goodwill has been found in medical practices, law practices and orthodontic practices. (*Foster*, at p. 582, fn. 2; *In re Marriage of Asbury, supra*, 144 Cal.App.3d 918 [husband disputed court's valuation of wife's interest in joint orthodontic practice].)

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8 "'The "good will" of a business is the expectation of continued public patronage.' . . . It is '"the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances, or necessities, or even from ancient partialities or prejudices. . . . [I]t is the probability that the old customers will resort to the old place. It is the probability that the business will continue in the future as in the past, adding to the profits of the concern and contributing to the means of meeting its engagements as they come in."'" (*Foster, supra*, 42 Cal.App.3d at pp. 581-582.)

The proper valuation of goodwill, of course, is only one aspect of the valuation of a professional practice. (See *In re Marriage of Garrity & Bishton* (1986) 181 Cal.App.3d 675, 688-689 [trial court erred in determining law practice had no value because goodwill had no value].) In this case, however, it is a major component of the overall valuation figure and one of only two significant points of disagreement between the parties.

Goodwill has been described as "elusive, intangible, difficult to evaluate . . . . [¶] It has been aptly stated: 'Accountants, writers on accounting, economists, engineers, and courts, have all tried their hands at defining goodwill, at discussing its nature, and at proposing means of valuing it. The most striking characteristic of this immense amount of writing is the number and variety of disagreements reached.'" (*In re Marriage of Lopez*, *supra*, 38 Cal.App.3d at p. 108.) Thus, "[n]o rigid rule applies for determining the value of goodwill. [Citation.] Rather, it 'may be measured by "any legitimate method of evaluation that measures its present value by taking into account some past result," so long as the evidence "legitimately establishes value."'" (*In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, 200; accord, *Foster*, *supra*, 42 Cal.App.3d at p. 584; *Watts*, *supra*, 171 Cal.App.3d at p. 371.) "Insofar as the professional practice is concerned it is assumed that it will continue in the future." (*Foster*, at p. 584; accord, *Watts*, at p. 371.)

The "excess earnings" method—the sole valuation technique utilized by Mary's expert, Lieberman, and one of several valuation approaches employed by Michael's expert, Kohn—"is a method that is commonly used to determine the value of the goodwill in a professional practice." (*In re Marriage of McTiernan & Dubrow* (2005) 133 Cal.App.4th 1090, 1095 (lead opn. of Flier, J.); see generally Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2009) ¶ 8:1445, p. 8-350.) Nonetheless, because no particular standard or method for determining goodwill is appropriate in all cases, "each case must be determined on its own facts and circumstances, and the evidence must be such as legitimately establishes value. Opinion evidence is admissible but not conclusive. The trier of fact may take into consideration the situation of the business premises, the amount of patronage, the personality of the parties engaged in the business, the length of time the business has been established, and the habit of its customers in continuing to patronize the business." (*In re Marriage of Webb* (1979) 94 Cal.App.3d 335, 344; accord, *In re Marriage of Asbury*, *supra*, 144 Cal.App.3d at p. 923; *In re Marriage of Ackerman*, *supra*, 146 Cal.App.4th at p. 202; *Foster*, *supra*, 42 Cal.App.3d at p. 583.)

Michael acknowledges the numerous cases stating there is no absolute rule specifying how the goodwill of a particular practice should be valued and any reliable method is acceptable if warranted by the facts. Nevertheless, relying in large part on *In re Marriage of Sharp* (1983) 143 Cal.App.3d 714 (*Sharp*) and *In re Fortier* (1973) 34 Cal.App.3d 384 (*Fortier*), and emphasizing Lieberman's testimony he used an "investment value," rather than a fair market value approach, to evaluate the goodwill of the orthodontic practice, Michael contends the court erred in basing its own finding on Lieberman's methodology and analysis. That is, Michael argues a court is required to use fair market value to value a professional practice and/or its goodwill unless it is unmarketable, the court lacks evidence of fair market value or the parties agree to use a different standard of value. (See *In re Marriage of Cream*, *supra*, 13 Cal.App.4th at pp. 88, 89 [trial court "cannot delegate its responsibility to fix the fair market value of the community estate where assets are not divided in kind"; "[w]e restrict use of this definition [of fair market value] to marketable assets because some marital assets are not marketable, but nonetheless may have to be valued"].)[9]

Neither *Sharp* nor *Fortier* supports Michael's contention the trial court erred as a matter of law in relying on Lieberman's capitalization of excess earnings methodology for determining the goodwill value of the orthodontic practice. In two short paragraphs the court in *Sharp*, *supra*, 143 Cal.App.3d 714 found it was error to evaluate a closely held corporation, which bought and sold airplane parts, on a "going concern" basis,

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9 "[T]he fair market value of a marketable asset in marital dissolution cases is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no obligation or urgent necessity to do so, and a buyer, being ready, willing and able to buy but under no particular necessity for doing so." (*In re Marriage of Cream*, *supra*, 13 Cal.App.4th at p. 89.)

which it defined as "'the amount by which the value of the assets as a whole, assembled together for the conduct of a business, exceeds the aggregate of the value of the separate items of property'" (*id.* at pp. 719-720, quoting *Pacific States Sav. & Loan. Co. v. Hise* (1945) 25 Cal.2d 822, 837), rather than by determining its fair market value. It is by no means clear from the opinion what, if any, alternative valuation methodologies had been presented to the trial court under the label "fair market value," although, because the business had been awarded to the husband and it was the wife who challenged the valuation, it is reasonable to assume whatever was meant by "fair market value" resulted in a higher figure than "going concern value."[10] Be that as it may, the opinion does not discuss valuation of a professional practice generally or the goodwill component of such a practice in particular and certainly does not stand for the proposition that goodwill may not be measured by capitalizing excess earnings in an appropriate case. (See generally *Santisas v. Goodin* (1998) 17 Cal.4th 599, 620 ["[a]n appellate decision is not authority

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[10] The absence of any discussion of expert valuation testimony makes it difficult to extend the conclusory statements in *Sharp, supra*, 143 Cal.App.3d 714, to other cases. Indeed, the concepts of "goodwill" and "going concern value" seem closely linked. For example, the court in *Foster, supra,* 42 Cal.App.3d at page 584 explained, "Community goodwill is a portion of the community value of the professional practice as a going concern on the date of the dissolution of the marriage." (Accord, *In re Marriage of Fenton* (1982) 134 Cal.App.3d 451, 461.) Similarly, outside the family law context goodwill has been defined as a type of going concern value: "'Goodwill value is a transferable property right which is generally defined as the amount a willing buyer would pay for a going concern above the book value of the assets.'" (*Redevelopment Agency of San Diego v. Attisha* (2005) 128 Cal.App.4th 357, 367.) Thus, to the extent *Sharp, supra*, 143 Cal.App.3d 714 might be read to suggest attempting to capture the value of that intangible community asset is improper, we necessarily disagree. (See, e.g., *Watts, supra*, 171 Cal.App.3d at p. 370 ["It is undisputed that in a dissolution case involving a professional practice the court must determine whether goodwill exists. If it does, the court must value it and take it into consideration in dividing the community property."].) Plainly what matters is whether the methodology for estimating the value of the community asset is appropriate, not the label—"fair market value," "investment value" or "going concern value"—the testifying expert attaches to the valuation techniques used.

for everything said in the court's opinion but only 'for the points actually involved and actually decided'"].)

Similarly, nothing in *Fortier, supra*, 34 Cal.App.3d 384 justifies Michael's position restricting the trial court's flexibility in addressing the difficult question of valuation of the goodwill of a professional practice. The *Fortier* court held only the trial court could—not must—value the goodwill of a community medical practice based on evidence of the amount an incoming partner in the practice had paid several years earlier: "[W]here there has been an arm's length sale of such interest (goodwill) and there is no showing of collusion or unfair dealing to the detriment of any interested party, the price paid can be said to be persuasive evidence of the value of that goodwill." (*Id.* at p. 388.) The court also upheld the trial court's rejection of the wife's alternative methods for evaluating goodwill because they were all predicated on her former husband's future income from the practice. "Since the philosophy of the community property system is that a community interest can be acquired only during the time of the marriage, it would then be inconsistent with that philosophy to assign to any community interest the value of post-marital efforts of either spouse." (*Ibid*.)

The excess earnings approach used by Lieberman and Kohn, in contrast, compares the past earnings of the professional in question (that is, his or her efforts in the practice on behalf of the community) with those of a peer whose performance is "average" and capitalizes the difference (that is, the excess earnings) over a specified period of years, discounted to present value. (See *In re Marriage of McTiernan & Dubrow, supra*, 133 Cal.App.4th at p. 1095 & fn. 1.) Nothing about that commonly accepted valuation methodology conflicts with "the philosophy of the community property system" discussed in *Fortier*. (See *Foster, supra*, 42 Cal.App.3d at p. 584 [upholding valuation of medical practice based on opinion of wife's expert, which "did not take into account the future efforts of [husband] or his future earnings, but took into account past earnings and projected these into the present value of the goodwill, taking into consideration the expectancy of the continuity of the medical practice"].)

Michael attempts to distinguish the cases authorizing a variety of approaches to valuing the goodwill of a professional practice by arguing they permit departure from a "fair market value standard" only if the practice was not marketable and thus had to be valued by some other standard or the parties had agreed to use another standard of value. (See, e.g., *Watts*, *supra*, 171 Cal.App.3d at p. 372 [where husband had excess earnings, trial court erred in concluding husband's surgical practice had no goodwill because there was no market for surgical practice; "the mere fact that a professional practice cannot be sold, standing alone, will not justify a finding that the practice has no goodwill nor that the community goodwill has no value"]; *In re Marriage of Rosen* (2002) 105 Cal.App.4th 808, 819 [parties agreed to use capitalization of excess earnings].)

The cases Michael cites certainly hold that a community professional practice must be valued even if the practice is not marketable. But that is far different from saying, as Michael argues, if the practice is marketable, that fact somehow limits an expert's choice of valuation techniques or "standards."[11] Indeed, it is not even clear what Michael means by a "fair market value standard" in this context.

Of course, evidence of an actual sale of the practice, including its goodwill, is persuasive evidence of its value. (See *Fortier*, *supra*, 34 Cal.App.3d at p. 388; see generally Evid. Code, § 815 [sale of subject property proper basis for expert opinion on value].) But there was no such evidence in this case. Michael's experts, no less than Mary's, were simply attempting to estimate the value of the orthodontic practice. Rather than relying on actual sales of comparable orthodontic practices, Fitterer and Kohn used a variety of techniques to project either the value of the practice in the aggregate or the goodwill component separately using various multiples of net income, gross revenue or capitalization of excess earnings.[12] The issue before the trial court was which expert's

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11 Michael's argument is a variation of the fallacy known in formal logic as denying the antecedent.

12 Kohn did use actual sales data but only as one of the three different methods he combined into a weighted average. (One of the other two approaches he used was capitalization of excess earnings—the valuation technique Michael now insists is

approach—or which combination of approaches—best approximated the value of the practice in order to effect an equal division of the community's assets. (Cf. Code Civ. Proc., § 1263.320, subd. (b) ["[t]he fair market value of property taken for which there is no relevant, comparable market is the value on the date of valuation as determined by any method of valuation that is just and equitable"].) This is not a question of law, as Michael would have it, but one of the sufficiency of the evidence to support the trial court's ultimate finding as to value. (See *Foster*, *supra*, 42 Cal.App.3d at p. 580 ["determination by us that a proper evaluation method was used by the trial court requires that we decide whether the evidence is sufficient to support the lower court's evaluation"].)

The court's valuation of the practice's goodwill is amply supported by the evidence in this case. (Using a capitalization rate of 3, which the court found reflected the practice's risk, instead of 4, which Lieberman had used, the court necessarily found the goodwill value was almost $1.9 million.) The court's figure is well within the range suggested by the experts' testimony. Lieberman, Mary's expert, opined goodwill was slightly in excess of $2.5 million. Fitterer, one of Michael's experts, placed the number at $1.3 million using a net income figure $200,000 less than that found by the court. Using Fitterer's methodology (130 percent of net income) and the court's net income number, goodwill increases to more than $1.5 million. Kohn, Michael's second expert, valued goodwill at a lower figure, but still nearly $1 million. The court's figure is, in effect, midway between these three numbers. It was well within the trial court's discretion to accept Lieberman's methodology (capitalization of excess earnings), which

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precluded as a matter of law.) However, Kohn conceded the orthodontic practices in the sales data he reviewed for inclusion in his weighted average were not comparable to Michael's. (See Evid. Code, § 816 [expert may base opinion on value of property on sale of comparable property; to be considered comparable, property sold must be sufficiently alike the subject property "to make it clear that the property sold and the property being valued are comparable in value and that the price realized for the property sold may fairly be considered as shedding light on the value of the property being valued"].)

was also used by Kohn, and to modify Lieberman's calculation downward and Kohn's calculation upward to arrive at what it believed was an appropriate valuation.

In essentially accepting Lieberman's goodwill valuation, modified somewhat downward, the trial court expressly rejected Fitterer's valuation because, among other reasons, "he failed to adjust his opinion regarding value of the practice after he learned about the extraordinarily high number of new starts at the practice." There was nothing improper about this decision: Fitterer, who had no experience valuing an orthodontic practice with this level of annual new starts, was "visibly shaken" by this information and initially indicated it would positively impact value. Retreating from that position, Fitterer eventually explained why he would not adjust his valuation. The court had ample reason to reject Fitterer's explanation offered after he had recovered from the surprise of learning the actual number of Michael's new starts. Similarly, the court's conclusion Fitterer inappropriately reduced the value of the practice because, based on his experience with prospective purchasers, he did not believe the Antelope Valley was a desirable location for an orthodontic practice was well within the bounds of reason, especially since Fitterer admitted the practice was not "a typical practice" inasmuch as it was grossing more and netting more than a typical practice.

b. *Substantial evidence supports the trial court's determination the value of the practice should not be reduced by patient prepayment fees*

One of Michael's two experts (Kohn) testified patient prepayments, valued at nearly $1.2 million, must be considered like any other liability, which reduces the value of the orthodontic practice. Michael contends the trial court erred in disregarding this significant liability in its valuation of the practice.

The trial court's treatment of patient prepayments was based on the Supreme Court's decision in *In re Marriage of Fonstein* (1976) 17 Cal.3d 738 (*Fonstein*), in which the Court held the trial court, in assigning to the husband the value of his interest in a law partnership, should not have reduced the value by the tax that might be incurred if the husband sold his interest at some future date. The Court explained, "Regardless of the certainty that tax liability will be incurred if in the future an asset is sold, liquidated or otherwise reduced to cash, the trial court is not required to speculate on or consider such tax consequences in the absence of proof that a taxable event has occurred during the marriage or will occur in connection with the division of the community property." (*Id.* at p. 749, fn. 5.) The Court noted, "The tax obligations which we consider today are not contingencies to the realization of an asset of the community. They are merely potential debts associated with the use or disposition of an item properly chargeable to the person owning the property at the time the tax obligation is incurred." (*Id.* at p. 751; see *Sharp*, *supra*, 143 Cal.App.3d at p. 717 ["'[Before] tax consequences may be considered in a division of community property, there must be proof of an immediate and specific tax liability [citations].' What tax consequences might result five or ten years down the road is not a proper consideration."].)

In this case the trial court found "prepayments for services are not an immediate and specific liability pursuant to [*Fonstein*, *supra*,] 17 Cal.3d 738, because they are part of the overall nature of orthodontic practices. Moreover, the Court [found] that the $1,175,000 liability was not immediate and specific because, in order to conclude that the liability [was] immediate and specific, the Court would have to accept, which it [did] not, the speculative testimony that all of the community orthodontic practice's patients were going to terminate their relationship with the practice even though there was no evidence presented at trial to support that conclusion."

Disagreeing with this analysis, Michael argues, unlike the contingent liabilities in *Fonstein* and *Sharp*, the patient prepayments constituted an immediate and specific liability: Michael had received money for services, which was treated as an asset of the business, but had not yet provided the services; thus, he owed his patients either the services or a refund. Michael asserts the patient prepayment liability is more akin to an actual tax liability that would be incurred by a court-ordered transfer or sale of property that must be taken into consideration either by reducing the value of community property or accounting for it in some other way than a speculative tax liability that may or may not occur after the division of assets depending on choices made after dissolution.

We do not disagree with Michael's expert that, from an accounting standpoint, the patient prepayments would properly be reflected on a balance sheet as a liability. But the trial court's decision to exclude that liability was well within its broad discretion in valuing a professional practice. (See *In re Marriage of Lopez, supra,* 38 Cal.App.3d at p. 108 ["[f]or purposes of a marital dissolution, the parties are primarily concerned with the existence, value and consequences of the 'goodwill' of a professional business in an *economic sense,* as distinguished from legal or accounting concepts"]; *In re Marriage of Slater* (1979) 100 Cal.App.3d 241, 246 [trial court was not required to adopt goodwill figure provided by wife's accountant "who valued the goodwill of the husband's practice 'as an accounting concept'"].) As the trial court suggested in its analysis of this point, every year the practice had a significant number of new starts. The prior year's new starts—together with their prepayments for services—are continually replaced by the current year's. The premise for the valuation of a professional practice and its goodwill is that it will continue into the future in essentially the same form as in the past. (See, e.g., *Foster, supra*, 42 Cal.App.3d at pp. 581-582 [goodwill "is the probability that the business will continue in the future as in the past"]; *Watts, supra,* 171 Cal.App.3d at p. 371 [community goodwill is "a portion of the community value of the professional practice as a going concern on the date of the dissolution"].) If it does, the liability represented by patient prepayments will never be realized and is properly excluded from valuation of the practice. (See *Fonstein, supra*, 17 Cal.3d at p. 750 ["[w]hile the parties assumed the partnership would be valued on the basis of withdrawal value, the fact remains that [husband] was *not* withdrawing and no tax liability was incurred during the marriage"; "although [husband] conceivably may do a number of things concerning his law partnership which may create tax consequences, 'there is no indication that he must or intends to do' any of them"].)

The trial court's treatment of patient prepayments is fully supported by the record. Mary's expert, whose methodology the court found "appropriate and credible," testified extensively as to why, unlike Kohn, he did not reduce the value of the practice by the patient prepayment fees. Moreover, as the trial court found, Michael's second expert contradicted Kohn's testimony regarding the necessity of reducing the practice's value by the patient prepayments: "Mr. Fitterer's testimony impeached Mr. Kohn's testimony by showing that it is not appropriate to reduce the value of the Community orthodontic practice to reflect a liability for prepaid orthodontic services."

Michael now argues Fitterer testified he did not know the amount of Michael's patient prepayment fees and that any such prepayment would be a liability. Read in its entirety and in context, however, Fitterer did not say the prepayments necessarily reduced the value of the practice, let alone on the dollar-for-dollar basis used by Kohn. Rather, he said it would simply be a factor to be weighed.[13] Although Michael contends there is nothing to suggest Fitterer had in mind prepayment fees as large as $1,175,000, it was up to Michael, who called Fitterer as a witness, to elicit additional, clarifying testimony if he believed it was necessary.

2. *The Trial Court Did Not Abuse Its Discretion in Declining To Award Mary a <u>Watts</u> Credit for Michael's Exclusive Use of the Community Orthodontic Practice*

The trial court has the authority to reimburse the community for the value of one spouse's exclusive use of a community asset between the date of separation and the date of trial—commonly referred to by the family law bench and bar as a *Watts* credit or *Watts* charge. (*Watts*, *supra*, 171 Cal.App.3d at p. 374; see *In re Marriage of Bell* (1996) 49 Cal.App.4th 300, 311; see generally Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, ¶ 8:855, p. 8-213.) Although as a practical matter a *Watts* credit appears to most often be at issue when one spouse has exclusive post-separation use of the parties' residence, the *Watts* case itself held the community may be entitled to reimbursement for

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13 Fitterer testified patient prepayments are a liability because a purchaser "would have to complete the cases for—for no remuneration," but "[a]s you consider all the—all of the factors that are considered in [valuing] a business, you may give it more or less credence. It would be a negative, yes. . . . Well, it would be negative, but then, again, you weigh it. You give everything weights. And the weighted factor in this particular practice is the big number that jars you in the head is the million dollars that he makes and so that might override, even though as a buyer he would have to take over some negatives, he may do so to gain that possibility to get that million dollars."

one spouse's exclusive use of a community medical practice: "We hold that the trial court erred in concluding that it had no authority to reimburse the community for the value of John's exclusive use of the family residence and the medical practice between the date of separation and the date of trial. [¶] Upon remand, the trial court will determine whether John should be required to reimburse the community for the value of his use of community assets after the date of separation in accordance with its findings. That determination should be made after taking into account all the circumstances under which exclusive possession was ordered." (*Watts*, at p. 374; accord, *In re Marriage of Baltins* (1989) 212 Cal.App.3d 66, 87 [husband "might be required to reimburse the community for his use of the assets," including medical practice].)

Neither *Watts*, *supra*, 171 Cal.App.3d 366, nor *Baltins*, *supra*, 212 Cal.App.3d 66—the only two published decisions that refer to possible reimbursement of the community for the exclusive, post-separation use of a professional practice—discuss how such a credit should be calculated. In general, however, as *Watts* made clear, reimbursement for exclusive use of a community asset must take into account all relevant circumstances and "'should not be ordered if payment was made under circumstances in which it would have been unreasonable to expect reimbursement.'" (*Watts*, at p. 373; see also *In re Marriage of Epstein* (1979) 24 Cal.3d 76, 84-85 [discussing corollary right to credit for use of separate property to pay community obligation and instructing that no reimbursement should be ordered if paying spouse could reasonably anticipate that payment would not be reimbursed].)

Mary contends the trial court abused its discretion in denying her any *Watts* credit for Michael's exclusive use of the community orthodontic practice following their separation, arguing the court agreed she was entitled to such a credit but nonetheless awarded none only because it did not know how to calculate the credit in this case. According to Mary, although the court has considerable discretion in determining an equitable distribution of community assets, the denial of any credit under these circumstances constitutes a reversible failure to exercise discretion. (See *In re Marriage* *of Gray* (2007) 155 Cal.App.4th 504, 515 ["trial court's failure to exercise discretion is itself an abuse of discretion"].)

Mary misconstrues the trial court's analysis and decision. After discussing the inadequacy of Mary's evidentiary presentation, the court denied her request for a *Watts* charge for Michael's exclusive use of the community property orthodontic practice. The court then provided an additional three pages of discussion on the complex problem of determining how a trial court could or should compute a *Watts* credit for the exclusive use of a community property professional practice. Mary misinterprets this post-decision analysis of the general problem, which includes an invitation for some appellate court guidance on the issue, with the court's basis for rejecting her request for a credit in this case.

The court, like Michael, acknowledged the general principle that a *Watts* credit might, under appropriate circumstances, be ordered when one spouse uses a community asset after separation and, as a result, has earnings that exceed those reasonably attributable to the spouse's post-separation efforts (that is, his or her separate property earnings). That is the import of the court's observation "there is no conflict in principle between imposing a *Watts* charge on a professional practice and the valuation of the practice, including the dissolution of marriage measure of goodwill, any more than there is a conflict between imposing a *Watts* charge on an asset like a residence before valuing it at trial and awarding it to one of the parties at that value."

However, the trial court did find—as do we—a potential conflict in imposing a *Watts* charge on one spouse's use of a community property, income-producing professional practice and the requirement that that spouse pay spousal support based on the income earned from the practice. As the court explained, if Michael had paid Mary on a current basis for his continued exclusive use of the orthodontic practice (based on the fair rental value of the premises and equipment, for example, plus some appropriate return on "goodwill"), that income would have significantly reduced both Mary's need for and Michael's ability to pay temporary spousal support. Whether it would have reduced her $26,850 spousal support award to zero is impossible to determine on this record. But it is unreasonable under these circumstances for Mary to have expected a *Watts* credit that did not fully recognize the direct relationship between Michael's use of the community asset and his temporary spousal support obligation. (Cf. *In re Marriage of Epstein, supra,* 24 Cal.3d at p. 85 [explaining that reimbursement for use of separate property to pay a community obligation "'should not be ordered where the payment on account of a preexisting community obligation constituted in reality a discharge of the paying spouse's duty to support the other spouse or a dependent child of the parties'"]; see generally Hogoboom & King, Cal. Practice Guide: Family Law, *supra,* ¶ 8:860, p. 8-216 ["allocation of *Epstein* credits and *Watts* charges will *not* be required when the 'in spouse's' postseparation exclusive use of a community property asset and the 'out spouse's' postseparation payments on that asset *are taken into account in fixing pendente lite spousal support*"].)

In short, while Michael indisputably had sole use of the orthodontic practice following his and Mary's separation, whether Mary was entitled to any *Watts* credit is unclear. As the party seeking the credit, it was Mary's burden to establish her right to it, as well as its value, under the specific circumstances of this case, including addressing the relationship between Michael's income from the use of the community asset and his temporary spousal support obligation. Although the trial court acknowledged the "challenge" faced by Mary's expert "of inventing a methodology for computing a *Watts* credit for a community property professional practice which is exclusively used by one spouse"—"waters never charted by the legislature or appellate courts"—the court did not simply abdicate its responsibility to "divide the community estate of the parties equally" (§ 2550). As noted, the court expressly found the expert testimony upon which Mary based her claim "does not produce a measure for a *Watts* charge that reasonably measures the value or benefit of having exclusive possession of the community orthodontic practice." Specifically, the court found it did "not have actual evidence of the appropriate value of the community property orthodontic practice for purposes of determining the correct *Watts* charge" and Mary's expert failed to address the relationship between Michael's income from the use of the community asset and his temporary spousal support obligation. That is, the trial court essentially determined there was insufficient evidence establishing the existence of Mary's claim for a *Watts* credit. In so ruling, the trial court did not abuse its discretion.

3. *The Trial Court's Finding Michael Did Not Breach His Fiduciary Duty to Mary Is Supported by Substantial Evidence*

The Family Code imposes fiduciary obligations, including the duty of disclosure, on spouses. Section 721, subdivision (b), provides, "in transactions between themselves, a husband and wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other." The rights and duties that comprise that relationship include, but are not limited to: "(1) Providing each spouse access at all times to any books kept regarding a transaction for the purposes of inspection and copying. [¶] (2) Rendering upon request, true and full information of all things affecting any transaction which concerns the community property. . . . [¶] (3) Accounting to the spouse, and holding as a trustee, any benefit or profit derived from any transaction by one spouse without the consent of the other spouse which concerns the community property."

Section 1100, subdivision (e), makes these provisions applicable during dissolution proceedings: "Each spouse shall act with respect to the other spouse in the management and control of the community assets and liabilities in accordance with the general rules governing fiduciary relationships which control the actions of persons having relationships of personal confidence as specified in Section 721, until such time as the assets and liabilities have been divided by the parties or by a court. This duty includes the obligation to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest and debts for which the community is or may be liable, and to provide equal access to all information, records, and books that pertain to the value and character of those assets and debts, upon request." (See *In re Marriage of Feldman* (2007) 153 Cal.App.4th 1470, 1475-1476.)

To protect community and quasi-community assets between the date of separation and distribution, section 2100, subdivision (c), requires disclosure of all assets in which one or both parties have or may have an interest "in the early stages of a proceeding for dissolution of marriage or legal separation of the parties." In addition, the section imposes on each party a continuing duty to update and augment that disclosure to the extent there have been any material changes so that at the time the parties enter into an agreement for the resolution of any of these issues, or at the time of trial on these issues, each party will have as full and complete knowledge of the relevant underlying facts as is reasonably possible under the circumstances of the case. Effective January 1, 2002 section 2100, subdivision (c), was amended to make the duty to update and augment disclosures an immediate one. (See Stats. 2001, ch. 703, § 2.) Similarly, section 2102, subdivision (a), imposes section 721's fiduciary obligation of full disclosure on both spouses between the date of separation and the date of distribution of the community's assets. This provision was also amended, effective January 1, 2002 to require an "immediate, full, and accurate update or augmentation to the extent there have been any material changes." (Stats. 2001, ch. 703, § 3.)

Although Michael's actions with respect to the 1997 tax refunds arguably violate the current requirement for an immediate and full augmentation of information to the other spouse, substantial evidence supports the trial court's finding Michael did not breach his fiduciary duty to Mary as measured by the law in effect in 1998.[14] Mary

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14 We review findings regarding one spouse's breach of his or her fiduciary duty to the other spouse for substantial evidence. (*In re Marriage of Duffy* (2001) 91 Cal.App.4th 923, 931.) In determining the sufficiency of the evidence, "a 'reviewing court is without power to substitute its deductions for those of the trial court.' . . . 'In resolving the issue of the sufficiency of the evidence, we are bound by the established rules of appellate review that all factual matters will be viewed most favorably to the prevailing party [citations] and in support of the judgment . . . . "In brief, the appellate court ordinarily *looks only at the evidence supporting the successful party, and*

testified she was aware there had been an overpayment of taxes for 1997; indeed, as the court found, she refused to sign the returns because of her objection to applying the overage to the following year's tax returns. Mary argues, however, Michael told her he wanted the overpayment applied to the following years' tax liabilities, so they would not get any refund. Thus, Mary believed Michael had arranged not to get a refund. Mary also contends the evidence shows she did not know until well after the fact that Michael had actually received a refund he had spent or that he had arranged to apply a portion of the refund to his personal taxes as opposed to their joint tax obligations.

The trial court, of course, was entitled to find Mary's testimony not credible, accepting instead Michael's testimony he had informed Mary they would be receiving a refund whether they filed jointly or not, the only question being the size of the refund. In any event, what Mary believed or understood about the tax overpayment or how it would be distributed does not determine whether Michael breached any fiduciary duty to her. The sole issue is whether Michael disclosed the asset—that is, the tax overpayment—to her. There is no question that occurred at least as early as October 1998. Moreover, Mary certainly knew Michael had actually received the refunds prior to her March 2001 motion seeking to have the refunds placed in a blocked account. Even if Mary was unaware of the refunds for some period before 2001, because there was at that time no requirement that Michael immediately update his 1998 disclosures of the tax overpayments, there was no breach of any fiduciary duty. It was sufficient if Michael augmented his earlier disclosures sufficiently in advance of trial of the disputed issue so that Mary had full and complete knowledge of the facts to facilitate resolution and division of the community property. That occurred in this case.

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*disregards the contrary showing.*" [Citation.] All conflicts, therefore, must be resolved in favor of the respondent.'" (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 60.)

## DISPOSITION

The judgment is affirmed except it will be corrected to reflect a credit to Michael for one half the proceeds from the sale of the 1996 Jeep Grand Cherokee. Michael and Mary are to bear their own costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.